

STATE OF MICHIGAN
COURT OF APPEALS

ETV, INC.,

Plaintiff-Appellant,

v

JEFFREY ANDERSON, JIM H. HULST, and
KOLEASCO, INC.,

Defendants-Appellees.

UNPUBLISHED

August 13, 1999

No. 209093

Kent Circuit Court

LC No. 97-002742 NI

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff, a long haul trucking company, contends that it sustained injuries when its former employees, defendants Anderson and Hulst, misappropriated trade secrets and used those secrets when employed by plaintiff's competitor, defendant Koleasco, Inc. We affirm.

We review a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether factual support exists for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The motion may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* The party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists for trial, with all inferences drawn in favor of the nonmovant. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994); *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987). A motion under MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence; the adverse party may not rest on mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

Plaintiff first contends that the trial court erred in finding as a matter of law that the information taken by defendants Anderson and Hulst was not proprietary. A review of the trial court's decision reveals that the court did not resolve the question whether the information taken by defendants constituted proprietary information or trade secrets. The court simply assumed that the documents taken did represent proprietary information, but concluded that defendants were nonetheless entitled to summary disposition because plaintiff failed to establish a genuine issue of fact regarding defendants' utilization of the information in soliciting plaintiff's drivers, or that plaintiff suffered damages resulting from defendants' conduct. Because the trial court made no determination regarding the proprietary status of the information, and because such a determination is also unnecessary to our disposition of plaintiff's arguments on appeal, we decline to consider this issue. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 278; 568 NW2d 411 (1997) (An issue not addressed by the trial court is unpreserved for appellate review.).

Plaintiff also argues that the trial court erred in determining as a matter of law that plaintiff failed to establish damages. Generally, an employee has a duty not to use or disclose confidential information acquired in the course of his employment. *Follmer, Rudzewicz & Co, PC v Kosco*, 420 Mich 394, 403-404; 362 NW2d 676 (1984). Plaintiff's cause of action for misappropriation of a trade secret requires that it prove that it made a confidential disclosure of a trade secret to defendants Anderson and Hulst, and that it was damaged by defendants' wrongful misappropriation of the secret. *Russell v Wall Wire Products Co*, 346 Mich 581, 582, 585; 78 NW 149 (1956).

For purposes of this appeal, we will assume, as did the trial court, that defendants misappropriated confidential information. Plaintiff admits that it had no lost revenue resulting from any attempts by defendant to utilize the appropriated information to solicit plaintiff's customers, but claims that it was injured because it had to absorb costs related to the loss of its employees who left to work for defendant Koleasco.

In support of their motion for summary disposition, defendants presented the nearly identical affidavits of all the drivers who left plaintiff's employ to work for defendant Koleasco. All of the drivers averred that they initiated contact with Koleasco, that no one connected with Koleasco solicited them for employment, that they left plaintiff due to job dissatisfaction, and that they would have left plaintiff even if Koleasco did not exist. In response to these affidavits, plaintiff presented the affidavit of Mike Lyons, a former Koleasco employee, who stated that he was present when defendants Anderson and Hulst contacted plaintiff's drivers on the telephone from Koleasco's office. Lyons' affidavit did not rebut the drivers' statements that they initiated contact with defendant Koleasco, left plaintiff's employment due to job dissatisfaction, and would have left their jobs with plaintiff regardless whether Koleasco even existed. Therefore, because plaintiff failed to create a genuine issue of fact regarding any damages arising from defendant's misappropriation of the drivers list and alleged solicitation of its drivers, we conclude that the trial court properly granted defendants summary disposition.

Plaintiff further maintains that it "set forward a host of damages it is appropriately entitled to claim in conjunction with the applicable case law, as well as what may be proved at the time of trial." Although plaintiff alleged in its complaint that defendants had been unjustly enriched by their misappropriation of plaintiff's information and alleged before the trial court that it was entitled to

“historical costs” it had invested in developing the information contained in the misappropriated documents, plaintiff failed to present anything beyond its own allegations to substantiate its entitlement to these damages. MCR 2.116(G)(4) (“[A]n adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided . . . set forth specific facts showing that there is a genuine issue for trial.”).¹ Therefore, we conclude that the trial court properly granted defendants summary disposition pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Hilda R. Gage

/s/ Jane E. Markey

¹ Plaintiff’s additional argument that summary disposition for defendants is precluded because its complaint had requested injunctive relief is without merit; pursuant to the parties’ stipulation, defendants are “permanently enjoined from contacting any of Plaintiff’s employees for the purpose of soliciting their employment,” “permanently enjoined from utilizing any of Plaintiff’s proprietary information to solicit customers and business opportunities away from Plaintiff,” and permanently enjoined from otherwise utilizing plaintiff’s information in any respect.